No. 12261

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A., a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

BRIEF OF APPELLANT IN REPLY TO APPELLEE'S ANSWERING BRIEF.

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Re-Statement of the Issues.

Three basic factual issues were presented by the pleadings for determination by the trial court. First, the parties, through their duly authorized agents, made and intended to make a present contract of purchase and sale; this was evidenced by the four letters and by the confirmatory Donnelly-Kiefer letter. Second, the appellant was, at all times, ready, willing and able to perform its contract; there was no effective ban on exportation. Third, for the admitted breach of the contract, appellant is entitled to recover its damages. These three basic issues upon the extensive evidence produced before the trial court were all determined in favor of appellant. The meticulous examination of the evidence pro and con which has been made in the respective briefs filed has only served to demonstrate, beyond peradventure of a doubt, that the

factual determinations so made by the trial court were eminently warranted. The great weight to be accorded unto the decision and findings of the trial court are too well settled to require citation. Suffice it to say that, in every respect, there is ample evidence to sustain the Findings and Decision on the three basic points.

Bearing in mind the great weight to be given to the Findings and Decision, appellant has, nevertheless, pointed out that there was no evidence to sustain the factual finding as to the market value of glucose, in September, and the existence of two markets, one for export and the other for domestic use, nor that the negotiations between the parties did not contemplate liquidation through orderly operation of the contract. But these are points comparatively minor to the three basic findings above noted.

Two serious errors of law constitute the gravamen of this appeal. First, the fixing of June 6th as the date upon which damages must be determined; and, second, the refusal to give confirmation to the rate of exchange agreed upon by the parties in their contract. Full coverage of these points has been made in the opening brief.

Disingenuous, indeed, is appellee in its introduction of irrelevant points pursued in its evident strategy to complicate the truly simple and plain issues of the case at bar. It is to restore the true viewpoint, before tersely noting the errors in appellee's present brief, to which this is a reply, that this restatement has been made. Reply to the Brief of Appellee in Answer to Brief of Appellant will now be made in direct order as therein stated.

For brevity, incorrect factual statements are collated in the appendix; reference is then made through Appellant's Opening Brief to full transcript citations.

Reference for reply to Appellee's Brief, headings I, II, and III, being Preliminary Statement, Statement of Pleading and Jurisdiction, pages 1 to 4, is made to Appellant's Opening Brief, pages 1 to 16.

ARGUMENT.

Answer to the Argument in appellee's brief will be made in accordance with the headings in that brief, with the certain inclusions of answers to its statement of facts. The confused argument of appellee requires certain segregations which will be noted under each heading.

A. The Market and Measure of Damages.

In the review of appellee's brief there necessarily are included corrections as to the testimony therein given on the market price, pages 15 to 18, inclusive. The reason for this is that appellee confuses and relies upon this testimony in his argument on the Measure of Damages, which extended from pages 19 to 26, inclusive, with variations throughout his heading of Minimization of Damages.

1. The Governing and Statutory Rule for Damages.

Where there is no acceptance of goods and there is an available market, the damages are measured by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted. No assumption other than under this rule ever had been made, contrary to appellee's statements on page 20. However, if appellant had made such an assumption, it would have acted under excellent authority.

> *United States v. Benton Coal Co.*, 273 U. S. 337, 47 S. Ct. 351, 71 L. Ed. 670-2.
>
> "Appellee was bound to deliver the quantity of coal covered by the contract. Failure of the sources referred to in the contract would not excuse it. In contemplation of law, it could have obtained the coal at market prices prevailing at the time when deliveries were required under the contract."

Never before, by argument or evidence, has appellee advanced its present theory; never was there even an offer of proof of the price of appellant's purchases in connection with market price; never after May was appellant interested in glucose purchases. It had purchased the entire quantity prior to the repudiation notice. It is a trivia to state that market price is that at which a willing seller will accept and a willing buyer pay. Therefore, evidence of market, whatever the words of the witness, necessarily involves both such a seller and such a buyer.

Packing Co. v. Sunland Sales, Ass'n, 100 Cal. App. 126-133, 279 Pac. 1036.

" 'Market price means the current price.' 'Market price' and 'market value,' when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. 'Market value' is the price at which goods are freely offered in the market *to all the world.*' "

Estate of Spitly, 124 Cal. App. 642-5, 13 P. 2d 385.

"In *Phillips v. United States,* 12 F. 2d 598, the court defines fair market value 'to be the value of the property in money as between one who wishes to purchase and one who wishes to sell, the price at which the seller is willing to sell at a fair price and a buyer willing to buy at a fair price, *both having reasonable knowledge of the facts.*' (Italics ours.) In *Heiner v. Crosby,* 24 Fed. (2d) 191, the court says: 'Sales made at a particular time and place may be significant, but the price paid is not necessarily decisive of fair market price or value. The fact of sales, in itself and without regard to the circumstances under which the sales were made, does not conclusively establish either statutory fair market price or value. Sales made under peculiar and unusual cir-

cumstances, such as sales of small lots, forced sales and sales in a restricted market may neither signify a fair market price or value, nor serve as a basis on which to determine the amount of gain derived from the sale.' "

2. The Glucose Market in August, 1946.

The condition of the market during August comprised the extent of the testimony of Mr. Berger, to which appellee lays great stress. The testimony, as noted by appellee, is of course, a correct quotation, but it has an entirely different aspect when set into the context and, indeed, falls far short of the reach which appellee claims. During this month, the testimony establishes that there was, in fact, no market; that the range of prices which he states of 1.23 to 1.25 pesos was merely a range of asked prices, with no buyers. That, however, is no market under the clear definitions of "market" in the preceding sections. The evidence given shows a mere asking price, with no takers. [R. 353.]

"Q. The export price on Argentine glucose was $1.23, that is, one peso and 23 centavos to one peso and 25 centavos in the month of August of 1946, was it not? A. That would be a little bit difficult to know the exact money when that happened.

Q. I asked you about that in your deposition. Do you recall it? A. Yes. It could be because at that time the price situation was more or less nominal.

Mr. Bronson: If it is not objectionable to you, I will read this and you can tell me if it is a correct statement. I am reading from page 102 of the deposition. You can follow me here if you prefer.

Mr. E. B. Stanton: All right.

Q. On August 2nd, on the next to the last page, that is the page immediately preceding one that contains your signature, we were referring to that let-

ter, in the third from the last paragraph reading [Testimony of G. Fred Berger]: 'In view of the fact that the Government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 123-125.' A. Yes; that was the nominal market because of recent activity on the market.

Q. Well, that was the market in any event? A. It was the nominal market.

Q. Let us put it this way: The market is made up of quotations, isn't it, on the exchange where the commodity is handled? A. Mr. Bronson, a market is made up wherever it is, sometimes on active quotations, sometimes on bid and asked when there is only nominal activity. This happens to be nominal activity and it is in effect a bid and asked quotation, 123-125 being the asked quotation.

Q. That would mean that that was the asked quotation— A. That is right.

Q. —or the lower one was the bid— A. 123-125 was—

Q. If you will excuse me—and the higher, the asked quotation. A. That is not bid and asked."

"Q. (By Mr. Bronson): All right, and there was no other market on export glucose than that particular figure set in the manner you have described, is that true? A. That is true.

Q. Now, isn't there, in fact, a difference between your domestic bulk market on glucose and the export market? A. Yes, that is quite right.

Q. And you were talking and you intend now to testify that this figure that I just read to you—that range of figures applies to the export market, correct? A. That is correct."

Mr. Berger also stated in the talk with Mr. Heymsfeld on September 5th, that the market was between 1.08 and 1.10 pesos. This statement, as developed in the opening brief, page 59, referred to a price prior to August 24th.

In August, there were no sales. The reason for this lack of sales is clear. According to the testimony of Mr. Lang [R. 967], the Argentine government, on June 16th proclaimed a campaign to reduce the cost of living. No new export licenses were granted until the order of August 29, 1946. Such is in accord with the above-quoted testimony of Mr. Berger. The testimony of the market witnesses produced by appellant are all to the same effect.

Polastri [R. 526]:

> "Later (after July) the market fell, with no possibility of doing any business. In my opinion the prices during the period July 1946 and May 1947 went down to such an extent that in order to make a sale it was necessary to have a vendue, in which only a price of about 0.20 centavos Argentine currency per kilo could be obtained."

Lang [R. 536]:

> "May and June 1946: pesos 1.15 to 1.22 per kg; July, August, September, practically no operation."

Lang [R. 541]:

> "In my own opinion the prices were in May 1946, 1.15 to 1.22 for asked and 1.13 to 1.20 for bid; in the month of June, 1946 prices applied without any change. July, August, September 1946, no sales, no operations, no prices. October 1946, 61 to 62 centavos; November 1946, 61 centavos, December 1946, 60 to 61 centavos."

Lakatos [R. 555]:

"May Pesos 1200.—per 0/00 kg. after which date, prices remained stationary, without business, as the trade was waiting for regulation of exports by the new Peron government, dedicated at that moment to a campaign for reduction of the cost of subsistence, and there were no new export permits forthcoming, although permits for sales up to the end of May have been conceded and these were exported accordingly.

This situation was resolved by September 1946; but by that time the international market for corn syrup became weaker, competitors from U. S. A. started offering at prices lower than Argentine producers were asking; the more so, as in purchases by an outsider, the market went to unusual heights and speculators purchased all available quantities to be produced up to March 1947 at the then prevailing prices, viz.: Pesos 1200.—a ton."

The statement of the above-quoted testimony of the Argentine market experts harmonizes with the testimony of Mr. Berger and again proves the error of appellee in its claim of two markets. The prices stated by Mr. Berger are in line with the various prices quoted by the Argentine market experts (Op. Br. p. 57). The undoubted solution is that all of the purchases by appellant were made on f.a.s. contracts. Mr. Berger, in giving his testimony, included the f.a.s. cost of 10 centavos. If 10 centavos is deducted from the asked price of the Berger testimony, of 1.23-1.25, it harmonizes precisely with the figures given by Mr. Dittisheim for June and July and with the price of Mr. Polastri for June. These June prices doubtless prevailed as asked prices on a market where there was no bid.

The export prices, as the testimony of all witnesses held, are and were, throughout the whole contract period, merely the difference between the market price and the cost of transferences to F.O.B. ship. This involved an invariable addition of 15 centavos to the market price. No foundation appears for the statement of appellee that the market price involved in this contract is anything different from the fair market price plus the cost of transference on board ship. In fact, the whole proof supports the last statement made. Therefore, the statement of appellee in this respect is simply incorrect, as is the statement that the evidence shows a cost of performance. No element of the cost of glucose has, at any time, been stated in the evidence or otherwise. The cost of transference to F.O.B., in addition to the market price are directly authorized by the authorities cited in Opening Brief, page 64.

3. Authorities of Appellee.

The selection of authorities by appellee, under this heading, is most unfortunate, in that none of them justify the broad statements made.

Boston I. & M. Co. v. Rosenthal, 68 Cal. App. 2d 564 does not justify the statement that California law requires proof of export prices in order to secure damages. The Court here was passing upon conflicting evidence as to damages due, and stated (p. 572):

> "The only question is whether there is evidence sufficient to support the $13 figure. We are satisfied that there is."

S. P. Mill Co. v. Billiwhack S. F. L., 50 Cal. App. 2d 79.

This case was decided on the rule of Civil Code 3353, instead of the prevailing Sales Code provision Civil Code Section 1784. The testimony upon which market price

was based included a profit to plaintiff of 75¢ per ton. The Court merely held that no evidence of market value or market price had been given.

Lineman v. Schmid, 32 Cal. 2d 204.

This case is a third in the series of *Rice v. Schmid* cases. It is applicable, in no respect, to the case at bar.

Upon this review it appears that appellee's statements are generally based upon incorrect statements of the evidence and improper inferences to be drawn from the evidence. A review of the facts definitely establish that Mr. Berger did not testify to any market value or price. In fact, he definitely stated that he was not qualified to answer any questions of differences with respect to export prices or export markets and that his organization was, in no respect, concerned therewith [R. 357]. The proof establishes that there was one market. This market broke the latter part of June and little or no activity appeared thereon until September.

B. Mitigation of Damages.

The defense of mitigation of damages is without avail in the case at bar, for several reasons. It is an affirmative defense and was not pleaded. It was not raised in the Trial Court. There is no finding thereon, nor was any requested. Appellant, in its negotiation, did all that it could to mitigate damages. Any action of appellant in placing the 1135 tons on the market would have enhanced the damages. Appellant, in its conduct, wisely aided and acted toward mitigation of damages. Coverage is here made of appellee's brief, pages 27 to 38.

1. The Defense Was Not Pleaded.

The Eighth Federal Rule of Procedure, Sec. C, provides that a defendant shall affirmatively set forth, in his answer, various named defenses "and any other matter constituting an avoidance or affirmative defense." This rule has had a broad interpretation, including therein defenses based on election of remedies and custom, agency and bona fide purchases.

Bagwell v. Susman, 165 F. 2d 412;

Roth v. Swanson, 145 F. 2d 262;

U. S. v. 673 Cases, 74 Fed. Supp. 622.

2. Appellee's Cases Do Not Bear Out Its Claims.

The Federal cases cited were all decided prior to the enactment of the Federal Rules of Procedure. They were likewise all decided prior to April 25, 1938, the date of the decision in *Erie v. Tompkins,* 304 U. S. 64.

Crane Iron Wks. v. Cox & Son, 28 F. 2d 328.

This was decided September 26, 1928. It was a second appeal. The prior case was decided April 28, 1925. The prior case states the facts and shows that mitigation of damages was pleaded and the issue there raised. The Court states in *Cox & Son v. Crane Iron Wks.,* 5 F. 2d 314:

On March 15, 1921, some 3½ months before the contract deliverey date the Iron Works brought suit based on a repudiation of date December 21, 1920. The Court held that plaintiff had elected to sue on the anticipatory breach rather than await the contract term. The pleadings raised the issue of mitigation. The trial court, nevertheless, refused to admit evidence of market value at the time of the breach sued upon and for this reason reversal was made.

In the second trial under the pleadings, defendant submitted evidence to the effect that plaintiff, at all times, was manufacturing and selling iron, had not appropriated the iron to this repudiated contract and if it had so done, the loss would be less than prayed. This was sufficient for the decision. Whatsoever was stated, and which appellee quoted, under the doctrine of *Erie v. Tompkins,* would not now be law. In any event, mitigation was here pleaded.

Samuels v. Drew & Co., 286 Fed. 278 and 292 Fed. 734 decided October 24, 1922. Not the law of sales or damages was the criterion of decision in these cases, but the nature and effectiveness of claims against an equity receiver. The contract provided for deliveries over a five month period. Prior to the last delivery receivers were appointed and in charge. They elected not to adopt the contract. The statement cited by appellees was *dictum* in that the actual decision held:

> "To constitute a provable claim against assets administered by a Court through receivership proceedings, it must be in existence at the time of the appointment of the receiver. The reason for this is, when a Court of Equity appoints receivers for an insolvent estate, it takes control of the assets and property of the estate for the benefit of all existing creditors. A fund is thus created to be administered for all creditors and to be charged with the obligations in favor of all existing creditors."

United States v. Harris, 100 F. 2d 268.

The election of the injured party to require compensation at the time of the anticipatory breach or subsequent thereto is the sole holding of this case. It is the injured party and not the injuring one who can control.

Lillis v. Western Fruit Growers, 44 Cal. App. 2d 826, 113 P. 2d 267;

Baylis v. Kingsholm Co., 5 Cal. 2d 68,

cited by appellee (p. 34) are both cases where the seller made resale under the provisions of Section 1783, Civil Code, hence they do not apply to this case. Resale such as in these cases made establishes the market price. The market price thus established is not as of the date of repudiation, but of the resale.

The New York cases cited (p. 33) are all lower court cases. They must bow to the controlling case of *Segall v. Finlay,* 245 N. Y. 61, 156 N. E. 97, later stated.

3. The Affirmative Defense of Minimization of Damages Was Not Raised in the Trial Court.

It is the general rule of Appellate Courts that they do not consider any issues which are not presented to the trial court. The remarks made by appellee that there was evidence which required the trial court to find that plaintiff was bound to sell or immediately thereafter mitigate damages (page 34), or that made on page 37 to the effect that the Court made any finding that the plaintiff acting as a private person should have disposed of the goods in June, 1946 is simply incorrect. There were no findings to any such effect and there was no evidence produced to sustain any position or remarks such as those made. The fact of the matter is that this issue was never raised in the trial court, either by evidence, by plea, or by argument. The trial court never had any opportunity of passing on this alleged defense. There was no finding thereon, nor was any finding requested.

4. The Burden of Proof of Mitigation Is on the Party Asserting the Issue.

> "The overwhelming weight of authority is to the effect that in actions for damages arising out of either breach of contract or tort, the burden is on the party whose wrongful act caused the damages complained of to prove anything in diminution of damages or, in other words, that the damages were lessened or might have been lessened by reasonable diligence on the part of the aggrieved party."

The foregoing quotation is quoted from the Summary of an extensive Annotation on the Burden of Proof and Mitigation of Damages, contained in 134 A. L. R. 243.

It is clearly evident from the annotation and from the quotations from the cases as therein stated that the weight of authority throughout the United States squarely places the burden of proof of mitigation upon the party asserting such an issue. Therefore, it follows that the burden of pleading such issue is placed upon the party claiming to assert it. Unless such issue is raised by the pleadings, the plaintiff would have no notice in order to permit it to prepare for trial, and produce the necessary countervailing evidence.

It is to be noted from the above-cited annotation that New Jersey, where the Crane case cited by appellee arose, is among the states which hold to the majority rule, placing the burden of proof upon the party asserting the issue. So, also, holds New York. California is among the states with numerous decisions upholding the majority view. In fact, contrary to the view of appellee, it is the explicit rule in California that not only does the burden of proof

rest upon the party claiming mitigation of damages, but the party must allege such issue in its pleadings.

> *Vitagraph v. Liberty T. Co.,* 197 Cal. 694-99, 242 Pac. 709.
>
> "When respondent proved the contract, the performance thereof by the delivery of the third and fourth films, and appellants refused to pay therefor, it established at least a *prima facie* case entitling it to recover as damages the amount which appellant had agreed to pay for the films (*Alderson v. Houston,* 154 Cal. 10). It was then for the appellant to prove facts in mitigation of those damages, and this it did not do. *It is generally held to be the duty of the defendant to plead the facts in mitigation of damages if he would rely thereon, and this the appellant did not do.*" (Italics added.)
>
> *Coke v. County of Sutter,* 206 Cal. 445-55, 274 Pac. 750.

The *Vitagraph* case and the Restatement of Contracts, Sec. 336, state the unquestioned law that the seller is under a duty to minimize damages. That, in effect, is all that the Michigan Law Review article states, but it is no part of the case of the plaintiff to be required to show that he, the plaintiff, has actually minimized damages. When the plaintiff produces the contract and the breach thereunder, he has established a *prima facie* case. It is then the duty of the defendant to undertake the burden under proper pleading, to establish that the plaintiff could or should have done something which he had not done, under which damages should be minimized. This is the rule of such cases as *Crane Iron Works v. Cox & Son* and *Cox & Son v. Crane Iron Works,* cited and discussed, *supra.* It is the rule of the *Vitagraph* case. It is the settled California rule.

Segall v. Finlay, cited *supra* and later, is a case directly on all fours with the case at bar. It merits a careful reading by this Court for its full import.

February 28th, the contract was made for importation of sugar from Cuba to New York over a period of time. The buyer repudiated. Negotiations for settlement ensued. March 12th the seller accepted the fact of repudiation and thereafter brought suit. The buyer contended for the price on the date of repudiation and that the seller should then have sold. The Court held that under the New York version of the Uniform Sales Act that the seller was entitled to the difference between the contract price and the market price on the contract delivery date, stating "No one can reasonably contend that the goods ought to have been delivered either on February 28th or March 12th." This decision had the concurrence of Chief Justice Cardozo. The Court in this decision without naming decisions prior to the enactment of the Uniform Sales Act actually did hold contrary thereto. In effect it held that under the act there was no duty to mitigate damages. It is to be noted that mitigation was not expressly pleaded.

5. All That Could Be Done to Minimize Damage Was Actually Done by Appellant.

Within four days after the June 7th wire of Mr. Woolsey, the appellee, through Mr. Metcalf and his phone and wire of June 11th, undertook a plan to minimize the damages to appellee. The development of this plan is fully set forth in the Opening Brief, pages 28 to 33 and 42 to 47. There is outlined a practicable plan, in which appellee would join with appellant. It was a plan agreed upon by appellee through Messrs. Metcalf and Dichter. It was a plan that appellee itself abandoned by the very words of its secretary.

Indeed, there was a market for glucose in moderate quantities in Buenos Aires, in June, but news of the repudiation by appellee wrecked that market in the latter part of the month. The sworn evidence of all of the Argentine market witnesses conclusively proves that if appellant had thrown this glucose or any part of it upon the market, it could not have moved except at forced sale and then at prices of, possibly, 20 centavos per kilo. In other words, the market would have been entirely broken and practically nothing would have been realized. [R. 495, 506, 517, 527, 537; Exs. 60A, 60B, 60C, 60D and 60E.] In fact, as the depositions show, the suppliers themselves did not, in their dealings with appellant, throw any of the glucose upon the market. As it is stated, "it would have taken the bottom off the market." In effect, appellant did all that could be done to minimize damages. It held the glucose. It fought with its suppliers and finally arranged with the contract suppliers to repurchase the glucose from it. There is no finding that appellant should have disposed of the goods in June. There is no finding and no possible evidence that appellant was speculating on the glucose at any time. The definite evidence is that, in September, after knowledge that the appellee would not go through with the Dichter and Metcalf agreement, appellant searched the world for a market and was unable to dispose of any but a portion of the 400 ton oral contract glucose. No one can point out one single thing under the evidence and the conditions prevailing, which appellant could or should have done and failed to do. The efforts of the appellant in the disposition of this glucose for the benefit of all parties is entitled to commendation of the highest order.

C. The Breach of Contract to Purchase Commodities to Be Delivered in the Future Involves Payment of Damages in Accordance With the Statutory Rule.

Weird and eerie is the fact statement and argument presented by appellee under this head. It appears in its Brief, page 19, and extends from page 39 to 43. Should appellee consult a dictionary, briefs could be brief.

A definition of "Futures" (38 *Corpus Juris Secundum,* Sec. 1, p. 68, also 86g, p. 148):

> "*Futures.* A term applied to contracts for the sale of margins or products for future delivery, in which either seller or buyer may elect to make or demand delivery of the goods agreed to be sold and bought, but where uniformly no such delivery is made, and final settlement is made by payment and receipt of the difference in price at the time of delivery from that prevailing at the time the sale was made."

Clearly the contract in the case at bar comes, in no wise, within the definition of futures. Delivery of the glucose was, at all times, contemplated by all parties. The evidence is clear that the glucose was actually manufactured and in the warehouse either of appellant or its contract suppliers. Some of the suppliers stated that it was in their storage at the time of taking their depositions in 1947. Fifty tons were on hand, ready for delivery by appellant in June. Nor is there one iota of evidence that there ever was any Buenos Aires market for trading in futures. In fact, the contrary is definitely shown. The proof is uncontradicted that there was no market for the 1135 tons of glucose, constituting as it did one-seventh of the Argentine glucose export.

The cases cited by appellee again do not bear out the broad conclusion stated.

Renner v. McNeff Bros., 102 F. 2d 664.

No evidence was produced as to values at the time of deliveries. The only evidence was of the value of contracts for future delivery at the time of the repudiation. The contract specified deliveries in the Fall of the years 1935, 1936, and 1937. Defendant repudiated in July of 1935. Suit was brought January 1936. Thereby the seller elected to have the damages assessed as of the repudiation, by which appellee desired to minimize its damages. Appellant was agreeable at every point. (Op. Br. pp. 28 and 42.)

Samuels v. Drew, 286 Fed. 278, as above noted, dealt with admissible claims in an equity receivership.

U. S. v. Harris, 100 F. 2d 268

dealt with the right of the injured party to elect the point at which the measure of damage must be applied.

Reference is made for a full decision to Opening Brief, page 21.

D. The Election of the Seller Has No Retroactive Effect.

Thorough consideration of this heading has been given in Opening Brief, pages 21 and 48, to which reference is made. This heading covers pages 43 to 49 of Appellee's Brief.

Under no stretch of a legal imagination can the June notices be held effective (Op. Br. p. 33). Appellant declined to accept them and insisted upon performance. The September 18th letter indicated a necessary course of action to handle the mounting glucose deliveries. It was in accord with Civil Code, Section 1783. However, the

glucose was actually, at all times during the contract, held by appellant and appellant was, at all times, ready, willing and able to perform up to the date of filing its action in January 1947. It is true that prior to September 18th there had been various contract violations by appellee, it had failed to furnish shipping on which to load the glucose; it had failed to pay or furnish the contracted letter of credit; it had failed to carry out the plan for orderly liquidation pending between the parties from June to September. Definitely the appellant had the right, under Section 1783, and in the words of the statute to "treat the goods as the buyer's." The seller would have the right, under its bailment to sell under the provisions of Civil Code, Section 1780. These actions all would be in harmony with the legal incidents of the contract, incorporating as it necessarily did into its terms the provision of law applicable thereto. There certainly was no "unequivocal acceptance" either on September 18th or until January 1947. It was on September 20th that appellee gave its first actual notice of repudiation. That notice was never acted upon or accepted. The clear statement of the September 18th letter was to insist upon retention of the contractual relation. Therefore, it could not be an acquiescence in a repudiation or anticipatory breach. Incorrect is the statement that the trial court found that appellant acquiesced in any breach, there is no evidence to sustain any such finding. In fact, appellant has and does wholly reject the entire views of the September repudiation notice.

Assuming, for argument's sake, that there was an acceptance by appellant of any repudiation or anticipatory breach, it follows not at all that such acceptance relates back to June 6th or 7th. We have noted (Op. Br. p. 36) that the June notices were ineffective for any purpose. We have noted (Op. Br. pp. 28 and 43) that appellee undertook to clear the June fifty ton delivery. We have

noted that, until September, negotiations were pending and undetermined for orderly liquidation. Until September 20th, the date of the first repudiation by appellee, the contract under every rule of law, was in full force and effect. Practically, by neither action nor communication, was there any acceptance of the September 20th repudiation notice. The rule as stated in the following authorities requires an "unequivocal acceptance." Even so, the contract, under the rule, continued until that date. Never was there any acquiescence in the repudiation, always a rejection of appellee's entire stand.

Robinson v. Raquet, 1 Cal. App. 2d 533-42.

Repudiation, or renunciation "is in the nature of an anticipatory breach before performance is due, but does not operate as an anticipatory breach unless the promisee elects to treat the repudiation as a breach and brings suit for damages."

Alderson v. Houston, 154 Cal. 1-12, 96 Pac. 84;
Walker v. Harbor B. B. Co., 181 Cal. 773-78, 186 Pac. 356.

17 *Corpus Juris Secundum,* Section 472 P. 978:

"At his option, the promissee may reject the repudiation of a contract, and on such election the contract continues in effect for the benefit and at the risk of each of the parties. The renunciation of a contract by the promisor before the time stipulated for performance is not effective unless such repudiation is unequivocally accepted by the promisee. If the promisee declines to accept the renunciation and continues to insist on the performance of the promise, as he may do, the contract remains in existence for the benefit and at the risk of both parties, and, if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge."

Segall v. Finley, supra, expressly determined that the repudiation acceptance had no retroactive effect.

The authorities cited by appellee go no further than to uphold the right of election of the injured party to select the date at which damages shall be measured. Necessarily, if the seller counts upon an anticipatory breach as the basis of his cause of action, then the measure of damages to be taken is the market value at the time of breach. But in case the seller awaits the term of the contract, the measure of damage is that specified by the Statute and Restatement of Contracts.

E. The Contract Rate of Exchange Must Prevail.

Whatever induced the parties to write into their contract the rate of exchange at which the contract would be performed is immaterial under the pleadings. No lack of meeting of the minds such as fraud or mistake is alleged. The contract rate of exchange is binding upon the parties and upon any Court interpreting or enforcing that contract. The appellee does not even seek to avoid the contract promise. Whether or no the result of this contract rate benefits one party or the other is immaterial. It must be remembered that Mr. Donnelly, in his communication to Mr. Kiefer, considered it very favorable [R. 409; Ex. 58] as the contract rate, being in accordance with the pegged rate, would not be subject to fluctuation and "this means that the only variation in price that can occur will be in the freight rate, where there may be a slight difference."

Conclusion.

The thorough examination of the practical and legal issues raised has emphasized the preliminary statement that the issues in this case are clear-cut and simple. Bearing in mind these cameo-clear issues, the confused strivings in opposition fall as dross. The parties made a contract. Appellee, for its own purposes, with a falling market, broke that contract. It may not now avoid the inevitable penalty of that breach.

Respectfully submitted,

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APPENDIX.

The Facts.

Error in Appellee's Br., Page		
7	1.	The June 6, 1946 breach notice was ineffective and the sender lacked authority. (Op. Br. p. 36.)
7	2.	The original complaint was superseded by the amended complaint filed August 4, 1947. [R. 18 to 28.]
8	3.	Cable is correct, but was preceded by the June 5th cable. (Op. Br. p. 29.)
8	4.	It was the day after receipt of the June 8th cable that Mr. Metcalf, on June 11th, sent the cable quoted. (Op. Br. p. 42.)
	5.	Several transactions are missing between the Metcalf cables of June 11th and the Berger cable of June 14th and the reports from appellant's counsel. (Op. Br. p. 29.)
10	6.	Mr. Dichter was directly sent to Buenos Aires. (Op. Br. p. 30.)
11	7.	The June 24th statement to Dichter was a Schenley inter-office communication as instruction to Mr. Dichter. Note: He was required to ascertain as to expert licenses.
11	8.	The July 8, 1946 cable was sent only after careful examination made by Mr. Dichter. (Op. Br. p. 43.)
12	9.	The statement that "no one on defendant's behalf ever agreed to this plan of liquidation" is incorrect, Messrs. Metcalf and Dichter both agreed. (Op. Br. p. 31.)

10. The cable quoted (July 8th) contemplated sales to third parties for the sole account of defendant by "orderly liquidation." (Op. Br. p. 31.)

11. The statement as to the facts of the negotiations is not in accord with the evidence. (Op. Br. p. 45.)

12. The rate of exchange was fixed by the contract between the parties . (Op. Br. p. 62.) Appellant would have received pesos at the rate of exchange specified in the contract. Any lesser rate, necessarily, would cause a loss.

13. There was but one market and one market price. (Op. Br. pp. 55-6.)

14. Mr. Berger did not testify as here stated. He actually testified [R. 354-5] referring to the 123-125 figures: "It was the nominal market." "That is not a bid or ask. That is the rate of the asked quotation at the time."

15. Appellant established, and the record abundantly shows, that the one market price, plus the cost of transfer to F.O.B. ship in Buenos Aires Harbor equalled the export price. This cost was a constant 15 centavos per kilogram. (Op. Br. p. 55.)

16. Glucose subject to future contract. This statement is wholly unsupported by any evidence whatsoever. In fact, it is contrary thereto. Fifty ton was for June delivery. It was purchased and physically taken into the possession of appellant. (Op. Br. p. 29.)